

UDOT Environmental Experience Capture & Transfer

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April 2004 Introduction

The purpose of this newsletter is to capture the lessons learned from specific projects and transfer that knowledge to the teams leading present and future projects.

This newsletter will be published on a monthly basis, will be e-mailed to all those who express interest, and will also be available for download via the UDOT web site. Information will be presented by UDOT Environmental Services and include comments received by local, resource center, and legal staff of FHWA. Every attempt will be made to ensure that the comments are placed in the appropriate context. If anything you read is unclear, please contact Reed Soper at 965-4159 or rsoper@utah.gov.

Legal Sufficiency for NEPA Documents

Recently, as part of an Environmental Document Quality Improvement Team, we were able to have a conversation with Lance Hanf and Martia Fox of the FHWA Western Resource Center. Our conversation centered on their expectations for legally sufficient documents and ways that they can help us be more successful with our projects. The main points of the conversation are summarized below.

- What does it mean to be legally sufficient? -- Lance and Martia explained that the requirements for legal sufficiency are defined in any regulations and that every attorney probably has a different opinion, depending upon their experience. They did state that legal sufficiency could be equated to document and process defensibility. Defensibility is based upon the reasonableness of the decisions made by the project. The document and/or administrative record must show the thought process that led to project decisions.
 - Lawsuits – Lance told us that most environmental laws, including NEPA, do not include a provision where the public can sue the government. The vehicle that allows the lawsuits is the Administrative Procedures Act (APA). FHWA legal sufficiency reviews help to ensure that the APA is complied with. The APA states that decisions are not to be arbitrary or capricious, or in essence, reasonable. He also mentioned that the way to demonstrate that we have considered the reasonableness of our decisions is through the administrative record.
 - Administrative Record – Lance reminded us that we cannot argue that we have considered something if details are not included in the administrative record. He mentioned that with the extensive use of e-mail, those communications are often not kept well for the administrative record. He referred to a project that had all project-related e-mail correspondence copied to an address that kept and maintained it for the administrative record. He suggested that we consider how e-mails are compiled and kept.
 - References – Lance and Martia both mentioned that a common problem they see in their reviews is in how other documents and reports are referenced. They said that often other documents are referenced that lead to a conclusion without offering supporting information. They said their preference is for referenced documents to be summarized in the text of the environmental document
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and that the location of the reference document be explained. Documents and reports covering known controversial issues should be included as attachments to the environmental document.

- Time frames for review – Lance and Martia stated that a 30-day review is pretty typically and is their office goal and they will continue to try to meet that. They cautioned that often the review comes with comments that will need to be addressed and that additional time should be allowed for that.
- “Hot-Button” Issues – They mentioned that if a project has some specific areas that are known to be controversial, they would be happy to review those specific sections in advance so that project teams can determine if they are on the right track.
- Project Team Attorneys – Our group specifically asked their opinion of project teams with attorneys as part of the team. Lance and Martia felt that this could be a benefit for major projects. They also indicated that typically states would need to pay for those attorneys.
- Internal UDOT Legal Sufficiency Reviews – The group discussed the prospect of having Jim Beadles (UDOT’s attorney) provide legal sufficiency review of environmental documents. Lance and Martia indicated that their office would probably be able to provide some training to Jim to help with those reviews. Any internal UDOT legal sufficiency review would likely not replace FHWA legal sufficiency reviews but help to ensure that the FHWA legal staff gets documents that are truly ready for their review.
- Good & Bad Document Examples – Our group expressed the desire to get examples of good and bad portions of documents from FHWA legal sufficiency. Lance mentioned that they might be able to put those examples on the Re: NEPA web page. The Re: NEPA webpage is located here: <http://nepa.fhwa.dot.gov/ReNepa/ReNepa.nsf/home>. We will continue to talk with Lance to see if this can happen soon.
- Paraphrasing the Law – One of Lance’s pet peeves is that many documents paraphrase the law. He strongly suggests that document preparers, when referencing what a law says, simply cut and paste from the law itself.
- Templates – Lance also mentioned that their office might be able to put together some templates or frameworks for Section 4(f) evaluations and/or cumulative impact analysis. Those templates would show the pathway that preparers should follow in their evaluations.
- Environmental Analysis – Lance and Martia both mentioned that generally there is too much effort spent on the Affected Environment section and too little analyzing and documenting the environmental impacts of the project. They mentioned that impact analysis is an area in documents that needs strengthening.
- “Bad Paper” -- Lance briefly described what he calls bad paper, communication from an agency or the public that is not resolved in the document. An example he offered was in a neighboring state, a state agency sent a letter requiring 600 acres of mitigation for an impact. The DOT decided to mitigate but at a much lower rate. While the DOT may have been justified in mitigating at a lower rate, without an explanation in the document and administrative record, they could not substantiate how they arrived at the decision. He said that all such communication needs to explain how it is being dealt with and close the loop with resource agencies through documentation.
- Response to Comments – Both Lance and Martia requested that comments and responses should be clearly outlined in all re-submittals. If teams have questions or concerns about any of their comments, it is suggested that the project team contact them on a conference call.

Upcoming Events

Training:

Noise Training on March 30 & 31, 2004

Community Impact Assessment (UDOT & FHWA staff only) on June 16 & 17, 2004

Conferences:

AASHTO SCOD/SCOE Annual Meeting, June 9-11, 2004 at Snowbird